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Governing Hate Content Online: How the *Rechtsstaat* Shaped the Policy Discourse on the NetzDG in Germany

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States around the world are struggling with illegal and hate content online. As one of the first Western democracies to do so, Germany passed the Act to Improve Enforcement of the Law in Social Networks (NetzDG) to tackle illegal and hate content online. The idea of the *Rechtsstaat* played a decisive role in the preceding policy discourse. Building on discursive institutionalism, this study analyzes how different actors used the *Rechtsstaat* to support or oppose the NetzDG. For this, it conducted a thematic analysis of 68 documents produced during the policy-making process in Germany from 2015 to 2017. The study shows that political actors used five different facets of the *Rechtsstaat* idea to support or oppose the NetzDG.

Keywords: NetzDG, hate content online, online platform governance, policy discourse, *Rechtsstaat*, discursive institutionalism

The massive proliferation of illegal and hate content online challenges states around the world. Germany was one of the first Western democracies to respond to these challenges. In 2017, the German parliament passed the Act to Improve Enforcement of the Law in Social Networks, also known as the NetzDG (short for the German *Netzwerkdurchsetzungsgesetz*). Reactions to the NetzDG have been mixed. On the one hand, it has been characterized as the so far “most ambitious effort by a Western democracy to control what appears on social media” (Thomasson, 2018, para. 2), a “revolutionary” law (Alkiviadou, 2018, p. 15), and “a milestone” (Wenguan, 2018, p. 6). On the other hand, it has evoked fierce criticism and is seen as a test case of a democracy to draw “the boundaries of free speech” (Tworek, 2017, para. 14). Even before the NetzDG fully came into force, human rights advocates such as the UN Special Rapporteur on Freedom of Expression warned that it would lead to the overblocking of content and to chilling effects on freedom of speech (Kaye, 2017). This impression is partly reinforced by examples of erroneous content deletions performed under it (Wilkins, 2018). Legal actions have even been taken against it before the Constitutional Court (Müller, 2018). The NetzDG provides an interesting insight for how a democratic state interprets its

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role in governing illegal and hate content online. Internationally, the NetzDG is often perceived as a “template” (Jayakumar, 2018) that has already informed the development of new approaches to governing online content and platforms in various other states (Mchangama & Fiss, 2019).

Research on the NetzDG has, among other things, focused on its legal compatibility. According to the majority of such legal analyses, it is incompatible with the German constitution and European and international law (e.g., Holznagel, 2017; Hong, 2018; Schulz, 2018). Furthermore, evaluations of the online platforms’ reports published under the NetzDG’s transparency obligations (e.g., Gollatz, Riedl, & Pohlmann, 2018; Heldt, 2019; Tworek & Leerssen, 2019) criticize their lack of comparability and detail. Even though a few studies summarize arguments from the policy-making process (e.g., Echikson & Knodt, 2018; Wischmeyer, 2019), the ideas that drove the development of the NetzDG have not yet been examined in detail. However, ideas can be decisive in policymaking inasmuch as they guide actors’ understandings, interpretations, and actions (e.g., Béland & Cox, 2010; Gofas & Hay, 2010). Building on discursive institutionalism as a theoretical framework, this study aims to investigate the role of ideas in policymaking in online platform governance in general and in the context of the policy discourse leading to the NetzDG in particular.

The idea of the *Rechtsstaat* was identified as dominant in the policy discourse on the NetzDG. The term is unique to the German-speaking world (Sontheimer & Röhring, 1977). Literally translated, it means “law” (*Recht*) and “state” (*Staat*). Superficially, a “law-based-state” (Koetter, 2010, p. 1) or “a state structured by law and protected by law” (Johnson, 1978, p. 184) may appear as a concept enshrined into legal and political thought in all Western democracies. However, owing to the country’s history, *Rechtsstaat* does indeed have a peculiar meaning in Germany (Koetter, 2010), where it serves as a guiding principle for politics and government. It is thus not identical to the Anglo-American “rule of law” (e.g., Barber, 2003), but has a particular multifaceted meaning, as the analysis of the policy discourse on the NetzDG conducted here shows. The policy discourse on the NetzDG facilitates a multifaceted understanding of the *Rechtsstaat* idea. The present study uncovers this idea’s role in the policy discourse on the NetzDG and answers the following research questions: In what ways was the *Rechtsstaat* idea interpreted and applied by actors involved in the policy discourse, and how is the idea reflected in the NetzDG’s content? Drawing from previous academic research, this article proposes a differentiation of five aspects of the *Rechtsstaat* idea and shows how these were applied extensively in the policy discourse on the NetzDG.

The article proceeds as follows: Section two provides a brief overview of the NetzDG’s development and content. Section three outlines the framework of discursive institutionalism and its attendant concepts of “idea,” “policy discourse,” and “institution” as well as detailed explanations of *Rechtsstaat* as an idea. From this, the article develops and proposes facets of the *Rechtsstaat* idea and a thematic grid for analyzing its role in the NetzDG policy discourse. Section four describes the application of a thematic analysis of documents from the NetzDG’s policy-making process. Finally, the article illustrates and discusses the role of the *Rechtsstaat* idea in the relevant policy discourse.

The Development and Content of the NetzDG

In Germany in 2015, hate content reached a new peak on online platforms (Schieb & Preuss, 2016). In September 2015, then Minister of Justice, Heiko Maas, initiated the taskforce for combatting illegal online

hate speech consisting of representatives of the ministry, Facebook, Google (for YouTube), Twitter, and civil-society organizations. In this taskforce, the platform companies committed to improving self-regulatory measures and the deletion of illegal content (Bundesministerium der Justiz und für Verbraucherschutz [BMJV], 2015). However, in March 2017, a report of the government-directed agency for youth protection online concluded that the platforms' takedown-practices had not substantively improved (jugendschutz.net, 2017). Based on this report, the Ministry of Justice announced the failure of self-regulatory approaches and voluntary commitments (BMJV, 2017b). In the same month, minister Heiko Maas proposed the NetzDG's first draft. After a rapid legislative process, the parliament passed the NetzDG in June 2017. It came into effect on October 1, 2017, and fully came into force on January 1, 2018. In February 2020, the German government outlined its new proposal to tighten the NetzDG.

The NetzDG aims to improve the enforcement of statutes of the German Criminal Code in the online realm. It targets "social networks" with more than 2 million registered users in Germany. Under Section 3 of the NetzDG, these networks are required to provide user-complaint mechanisms. Upon receipt of a complaint, platform companies have to determine whether the content is in fact illegal according to a list of statutes of the Criminal Code, as stated in Section 1, paragraph 3 of the NetzDG. According to Section 3, paragraph 2, "manifestly unlawful" content has to be removed within 24 hours; other unlawful content within seven days. If platforms systematically fail to comply with the NetzDG, they can face regulatory fines of up to €50 million under Section 4. The law also introduces transparency-reporting obligations for platforms in Section 2. Furthermore, Section 5 obliges platform companies to designate a contact person for German law-enforcement agencies.

Discursive Institutionalism and *Rechtsstaat* as an Idea

The hitherto dominant liability regime in Europe and the United States stipulates voluntary self-regulatory approaches and liability exemptions of platforms for the content they host (e.g., Laidlaw, 2015). Accordingly, in Germany, online content has historically been regulated by so-called regulated self-regulation (Hoffmann-Riem, 1996). With the growing proliferation of illegal and hate content online, this liability regime has come under scrutiny (e.g., Frosio, 2018). States are reconsidering their role in governing online content, with governance approaches ranging from self-regulation and coregulation to statutory regulation of online platforms (e.g., Latzer, Saurwein, & Just, 2019). Though previous attempts by the federal government to implement statutory regulations have failed (notably, for example, an Internet blocking system to hinder access to online child abuse images in 2009; Breindl & Kuellmer, 2013), the NetzDG's implementation as a statutory regulation constitutes a major shift in Germany's approach to governing online content.

For analyzing the policy discourse accompanying the implementation of this new governance approach, discursive institutionalism (DI) is a particularly suitable theoretical framework. Developed most prominently by Vivien Schmidt (2002, 2006), DI is an addition to the new institutionalist approaches and places policy discourses and ideas at the center of examining policy-making processes. In DI, policy discourses and ideas are important factors for explaining dynamics of change (Schmidt, 2006, 2008), such as the shift from regulated self-regulation to statutory regulation that occurred with the NetzDG's implementation.

***The Main Elements of Discursive Institutionalism:
Ideas, Policy Discourse, and Institutions***

Ideational approaches have been applied extensively in the analysis of policymaking in general (e.g., Béland, Carstensen, & Seabrooke, 2016; Gofas & Hay, 2010). Examples in research on communications policymaking include Napoli's (2001) study of the First Amendment as a foundation principle for other U.S. communication policy principles, or Streeter's (1996) analysis of policy discourses in the development of U.S. commercial broadcasting regulation, and Künzler's (2009) ideas-centered examination of broadcasting liberalization in different countries.

The constructivist foundation of DI more specifically is in line with "the argumentative turn" (Fischer & Forrester, 1993) in policy analysis, which regards ideas as forming the basis for the social construction of the world (Béland & Cox, 2010) and policy outcomes as "product[s] of argumentation" (Fischer & Gottweis, 2012, p. 7). Ideas in this sense refer to abstract, overarching principles that guide actors' understandings, interpretations, and actions in policymaking. They help actors to establish what they deem to be "appropriate, legitimate, and proper" (Béland & Cox, 2010, p. 3) and thus provide "the recipes, guidelines, and maps for political action and serve to justify policies and programs" (Schmidt, 2006, p. 306), contributing to "produce policy change" (Schmidt, 2010, p. 48). Ideas are therefore decisive for policymaking, and studying them is crucial for deepening our understanding of policymaking. This article asserts that, in the NetzDG's case, *Rechtsstaat* assumes the role of a discursive institutionalist idea.

The ideas articulated in a policy-making process abound in the policy discourse (Schmidt, 2012, p. 88). In this interactive "exchange of ideas" (Schmidt, 2010, p. 15), policy actors "refine, reframe, and reinterpret" ideas (Béland & Cox, 2010, p. 9) with their different conceptions. Through discursive interaction, they build up policies and justify them to the public (Schmidt, 2002). Thereby, "actors gain power from their ideas at the same time that they give power to their ideas" (Schmidt, 2011, p. 120). The interpretations and understandings of ideas constantly change, depending on the actors and situation, thus in turn affecting policy change.

In DI, institutions are the realization and "carriers" (Schmidt, 2010, p. 9) of ideas and emerge, among other things, from discursive interactions of actors. While ideas are the foundation of institutions, the latter form both the constraining and enabling context and setting for policy discourse and ideas (Peters, 2019). This article argues that the NetzDG constitutes a new institution in the discursive institutionalist sense: It emerged from discursive interactions of policy actors with diverging interpretations of the *Rechtsstaat* idea, embodies its different concretizations, and constitutes a major institutional shift in German online content regulation.

Rechtsstaat: An Idea With Various Facets

The origin of the idea of the *Rechtsstaat* can be traced back to Kant's (1797) *Metaphysische Anfangsgründe der Rechtslehre*. It was further developed in the 19th century, for example, by von Mohl (1855) and Welcker (1813), among other things, as a response to the German absolutist state and later to the totalitarian dictatorship in the Third Reich (Sontheimer & Röring, 1977). Today, the *Rechtsstaat* is one of the fundamental state principles of German democracy, as set out in Article 20, paragraph 2 and

paragraph 3, Basic Law (*Grundgesetz*). More than that, the *Rechtsstaat* is deeply enshrined in German politics and society as an idea in the sense of discursive institutionalism. It has been continuously shaped by actors' intersubjective exchanges and is therefore not a uniform term, but has several different facets (Blaau, 1990). Legal scholars have made a few attempts to tackle it (Schachtschneider, 2006). Sobota (1997), for instance, suggests that the term has more than 140 different aspects, whereas Kunig (1986) identifies a smaller core set of its essential facets. This article develops and proposes a set of five facets based on specialist and legal literature on the *Rechtsstaat* (see Table 1). Though there are various doctrinal positions on the *Rechtsstaat* and its multifaceted character (Gozzi, 2007), *Rechtsstaat* is particularly capable of capturing varying perceptions of legitimacy in the state order (Böckenförde, 1992).

Table 1. Facets of the *Rechtsstaat* Idea.

Number Facet	
(1)	Existence, validity, and primacy of law
(2)	Supremacy of basic rights enshrined in the Basic Law
(3)	Validity of constitutional principles from the Basic Law
(4)	State organization
(5)	Proper legislative procedure

In the first instance, the *Rechtsstaat* idea is expressed in the existence, validity, and primacy of law (1). Law can take the form of legislative acts such as the NetzDG, but also, more importantly, of the German constitution, the Basic Law. The precedence and supremacy of the basic rights enshrined in the Basic Law (2) are crucial to the *Rechtsstaat* idea (Koetter, 2010), obliging the state to minimize its interference with basic rights and to create the conditions for their fulfilment (Grimm, 1994). One particularly significant basic right in the NetzDG's context is the right to freedom of expression and speech in Article 5, paragraph 1, Basic Law. Importantly for the NetzDG's regulatory purpose, Article 5, paragraph 2, Basic Law, allows restrictions of freedom of expression and speech e.g., for the sake of other basic rights and constitutional values (Krotoszynski, 2003). In a procedural dimension, the existence, validity, and primacy of law also guarantees access to justice and a due process (Lorenz, 1973). This facet also involves an overall "pervasive role" (Bulmer, 1992) of law as an instrument of regulation in media and communications policy (Humphreys, 1990).

Furthermore, the *Rechtsstaat* idea is expressed in constitutional principles (3), which are explicitly and implicitly rooted in the Basic Law. Among these is the proportionality of state action, requiring that state actions need to be suitable, necessary, and proportionate for attaining a legitimate aim, particularly when basic rights are affected (Grimm, 2007). Consequently, the legal system has to create the preconditions for citizens' trust in it. This links to the principle of legal certainty, stipulating that law has to adhere to standards of clarity and definitiveness (Badura, 2010) and that state bodies have to act in a rational and predictable way (Loewenstein, 1937).

Moreover, the *Rechtsstaat* idea is reflected in Germany's state organization (4) as a parliamentary democracy "in which all publicly applied power is created by the law" (Koetter, 2010, p. 1). One of its cornerstones is the separation and differentiation of government powers (Currie, 1993). Horizontally, power

is separated among the legislative (the parliament and the Federal Council representing the 16 federal states), the executive (the federal government consisting of the chancellor and ministers), and the independent judiciary. Here, the Constitutional Court, the “guardian of the Basic Law” (Bundesverfassungsgericht, 2019, para. 2), holds an extraordinary position. It has the authority to review the conformity of state actions and legal norms with the Basic Law (Kommers, 1989). In numerous decisions, the court has further developed the limitability of freedom of expression and speech for the sake of human dignity (Krotoszynski, 2003). New legislative acts such as the NetzDG must conform to norms of higher hierarchy, especially the Basic Law and its basic rights. The legislative procedure also has to follow the Basic Law’s rules (5)—for example, that legislative acts have to be adopted in a proper process by democratically elected representatives of the people (Blaau, 1990).

Methods

To examine the role of the *Rechtsstaat* idea in the policy discourse, this study conducted a thematic analysis (TA) of 68 documents published during the NetzDG’s formal policy-making process and publicly available in May 2019. These documents were identified by creating a time line with core events of the policy-making process from September 2015 (the beginning of the taskforce’s work) to October 2017 (the NetzDG’s coming into force). Core events were, for example, the ministry’s stakeholder inquiry into the NetzDG or its first reading in parliament. The corpus therefore contains outputs from the policy-making process such as stakeholder submissions to the ministry’s inquiry and protocols of the parliamentary debates. Most of the documents can be clearly allocated to one of the three main groups involved in the policy process: the federal government, platform companies, and civil-society organizations. Table 2 gives an overview of the documents that were gathered for each group and included in the analysis.

Table 2. Exemplary Types of Documents Analyzed.

Main policy actor groups and main representatives	Document type
Federal government	Drafts and final version of the NetzDG
(e.g., Minister of Justice and Consumer Protection Heiko Maas, Ministry of Justice and Consumer Protection, members of the government coalition)	Explanatory memorandum of the NetzDG Ministerial speeches on the NetzDG Press releases and public briefings of the ministry on the NetzDG Documents from the ministry's special website on tackling hate content online (fair-im-netz.de) Protocols of speeches in parliamentary debate on the NetzDG Responses to the UN Special Rapporteur and Council of Europe
Platform companies and associations (e.g., Bitkom, Bundesverband Digitale Wirtschaft, eco-Verband der Internetwirtschaft, Facebook, Google, Selbstregulierung Informationswirtschaft)	Position papers submitted to the ministry's stakeholder inquiry <i>Declaration on Freedom of Expression</i> Speeches of platform representatives on the NetzDG Statements made in parliamentary inquiry on the NetzDG Legal assessment report commissioned by platform associations
Civil-society organizations (e.g., Amadeu Antonio Stiftung, Digitale Gesellschaft, Gesicht Zeigen! Für ein weltoffenes Deutschland, Netzpolitik.org, Reporter ohne Grenzen)	Position papers submitted to the ministry's stakeholder inquiry on the NetzDG <i>Declaration on Freedom of Expression</i> Statements made in parliamentary inquiry on the NetzDG Press releases and online articles on websites of civil-society organizations

This study applied a deductive approach to TA, a method “for identifying, analyzing, and interpreting patterns (themes) within data” (Braun & Clarke, 2006, p. 91). As TA is independent from one particular fixed theoretical framework (Clarke & Braun, 2017), it could be adjusted to the discursive institutionalist approach in a relatively flexible way. As shown in the explanation of the *Rechtsstaat* idea and summarized in Table 1, this idea consists of various facets. Like themes on the methodological level, these facets can be seen as systematically constructed, centrally organizing, abstract entities (DeSantis & Ugarriza, 2000) that are “implicit, implied and embedded in repetitive expression” (Herzog, Handke, & Hitters, 2019, p. 394). Thus, the theoretical entity of a facet of the *Rechtsstaat* idea was interpreted and treated as an equivalent of a theme on the methodological level. Based on the above description of the facets, and through intense engagement with German and English specialist literature on the *Rechtsstaat* (e.g., Barber, 2003; Blaau, 1990; Böckenförde, 1992; Gozzi, 2007; Kommers, 1989; Kunig, 1986; Schachtschneider, 2006; Sobota, 1997; Sontheimer & Röring, 1977), the previously identified facets were concretized in codes and integrated into a thematic grid for analysis (see Table 3).

Table 3. Thematic Grid for Analyzing the Role of the *Rechtsstaat* Idea and Its Facets (Themes).

Themes	Codes
Existence, validity, and primacy of law	Territorial jurisdiction and scope of law in general Need for everyone to adhere to and to obey valid law State action as shaped, framed, bound, and limited by law Pervasive role of law for regulation Need for effective and practical enforcement of law by the state
Supremacy of basic rights enshrined in the Basic Law	Reference to precedence of basic rights of the Basic Law overall Content of specific basic rights, such as human dignity (and personality rights deriving from it), freedom of expression and speech Procedural dimension of basic rights: guarantee for access to justice and due process for those wishing to take legal action State's obligation to promote, protect, and guarantee the fulfilment of basic rights and to adequately balance conflicts among them State's obligation to avoid interference with basic rights where possible
Validity of constitutional principles from the Basic Law	Reference to explicit or implicit constitutional principles, such as: principle of proportionality, especially when basic rights are affected (state action needs to be suitable, necessary, and proportionate to a legitimate aim) principle of legal certainty and trust in the legal system: clarity and definitiveness of law Predictability, calculability, and rationality of state actions
State organization	Vertical and horizontal separation of state power and competencies Independence of judiciary and prohibition of influence among the different branches Outstanding position of the Constitutional Court (including possibility of individuals to file constitutional complaints; previous decisions of the Constitutional Court as binding case law)
Proper legislative procedure	Legislative acts have to be initiated, adopted, and implemented in a proper and appropriate process in accordance to the legislative procedure stipulated in the Basic Law

Results and Discussion

In the policy discourse on the NetzDG, actors applied the *Rechtsstaat* idea explicitly and implicitly and drew on its various facets to support or oppose the law. The strongest support for the NetzDG came from minister Heiko Maas as the law's main initiator. Opposition to the NetzDG was raised, among others, by the targeted platform companies, their industry associations, and the majority of the civil-society organizations included in the analysis. Together with an unusual mix of actors and associations of Internet

policy and information technology, journalists, lawyers, academics, and even one former minister of justice, they united in an alliance signing the *Declaration on Freedom of Expression* (2017) against the NetzDG.

Existence, Validity, and Primacy of Law

Policy actors draw extensively on the existence, validity, and primacy of law. Minister Heiko Maas emphasizes that the NetzDG's adoption fundamentally concerns the primacy of law in the age of the Internet (Deutscher Bundestag, 2017a, p. 23849). The NetzDG is thus a necessary state action with binding force for private companies to show "that the Internet is not a space immune from law" (Deutscher Bundestag, 2017b, p. 25116, author translation). In this view, the creation of the NetzDG as a state action is an expression of the *Rechtsstaat*. As a statutory regulation, the NetzDG epitomizes the culmination of the outstanding position of law created and implemented by the state. It forms part of the formal rules established by the state, to which all members of society have to adhere. This also speaks to the pervasive role of law as a regulatory instrument as depicted in this facet of the *Rechtsstaat* idea.

The government stresses the validity of law in Germany, especially in the face of international platform companies and the Internet's cross-jurisdictional character (Deutscher Bundestag, 2017b, p. 25116). Most significantly, this is reflected in the NetzDG's scope in Section 1: although not explicitly, the NetzDG in fact specifically targets the three U.S.-based companies Facebook, Google, and Twitter. Furthermore, the need for state authorities to be practically capable of enforcing law in Germany is embodied in Section 5. It requires platform companies to designate a person in Germany authorized to receive requests from law enforcement authorities to ease prosecution investigations. Section 2 obligates platform companies to publish transparency reports in German and thus responds to the need for practical enforcement of law in Germany.

The primacy of law is simultaneously among the most heavily emphasized facets in the opponents' statements. They underline that to respect its primacy, law has to be properly enforced. However, as platform companies and civil-society organizations repeatedly argue, the NetzDG privatizes law enforcement by leaving the decisions on the lawfulness of content to private actors (e.g., Ladeur & Gostomzyk, 2017, para. 2; YouTube LLC & Google Inc., 2017, p. 14). In this manner, the state would shift the judiciary's responsibility to decide upon the legality of content to the platforms. This privatization of law enforcement implies that the state is abandoning its responsibility to enforce law (e.g., Amadeu Antonio Stiftung, 2017, p. 1), thus disrespecting the primacy of law.

On the other hand, the government and other supporters of the NetzDG highlight that it compels platform companies to assess content not just according to privately developed community standards but to democratically enacted law—namely, sections from the Criminal Code. The NetzDG therefore constitutes a shift from privatized content moderation to one with greater public accountability, they argue (Deutscher Bundestag, 2017a, p. 23848). They thereby emphasize that generally binding rules are to be created in a proper legislative procedure by the democratically legitimized parliament and not by private companies. As one member of parliament puts it, "We [as the legislative organ] must not abandon the Internet to corporations" (Deutscher Bundestag, 2017b, p. 25124, author translation). Additionally, the government contends that platform companies are already obliged to take down illegal content upon notification under the European e-Commerce Directive and the German Telemedia Act (Deutscher Bundestag, 2017a, p.

23848). The NetzDG only sets incentives for private companies to fulfil their existing obligations (Maas, 2017a, para. 1) for the sake of the law's validity, the government claims.

The divergent understandings of the *Rechtsstaat* idea also become apparent in policy actors' interpretations of three basic rights: freedom of expression and speech, equality before the law, and obligations deriving from property.

Freedom of Expression and Speech

The government emphasizes its protective duty to create the preconditions for all voices in society to be able to express themselves—as long as they do so in accordance with the law (Maas, 2017a, para 4.). The absence of hate content would be such a precondition for exercising freedom of expression and speech online (Deutscher Bundestag, 2017a, p. 23848; Maas, 2017b, para. 17). The government thereby stresses an empowering approach to freedom of expression and speech as a positive right. By forcing platform companies to improve deletion mechanisms for illegal content online, the NetzDG would thus realize the state's duty to protect the freedom of expression and speech "of those who are supposed to be silenced by defamations, slanders, hate and incitement" (BMJV, 2017c, para. 2). The government thereby also implicitly refers to its duty to protect citizens' fundamental rights, particularly personal rights deriving from human dignity, especially of victims of hate content online.

Despite a proposal by the Federal Council (Bundesrat, 2017, p. 5), the NetzDG does not provide for complaint procedures or reinstatement procedures for erroneously deleted content. Therefore, platform companies and civil-society organizations argue, the NetzDG violates the right to freedom of expression and speech of users whose content is erroneously removed (e.g., Bundesverband Digitale Wirtschaft [BVDW], 2017, p. 2; YouTube LLC & Google Inc., 2017, p. 2). Given the strict time frames in Section 3 and the threat of regulatory fines in Section 4, the NetzDG encourages platform companies to delete more content than necessary, without providing sufficient remedies for false deletions, platform companies and civil-society organizations assert. Overall, they highlight a conception of freedom of expression and speech as a defensive right against state interference, which the NetzDG violates (e.g., Amadeu Antonio Stiftung, 2017, p. 3). In a democracy, they argue, the right to freedom of expression and speech is vital for personal development and serves to guarantee a pluralism of opinions, including hardly bearable opinions (Declaration on Freedom of Expression, 2017, para. 4). In case of doubt, freedom of expression and speech should prevail, they underline, hinting at previous Constitutional Court rulings and thus also referring to the court's outstanding role in the state organization under the *Rechtsstaat* idea. They call for a "cross-societal approach" (Declaration on Freedom of Expression, 2017, para. 7) for tackling the roots of hate content online instead of merely deleting it.

Equality Before the Law

Both sides also explicitly refer to equality before the law, which is anchored in the basic right of Article 3, paragraph 1, Basic Law. Platform companies and their associations assert that by targeting only platforms with more than 2 million registered users in Germany, the NetzDG violates the basic right of equality (e.g., Ladeur & Gostomzyk, 2017, p. 5; YouTube LLC & Google Inc., 2017, p. 22). From this

perspective, the NetzDG discriminates against larger platform companies, because it imposes stricter transparency and organizational requirements on them than on platforms with fewer users.

In contrast, the government asserts that specifically equality before the law justifies the NetzDG's implementation. According to the minister, platform companies have to obey the law in the same way as "each journalist who makes a newspaper, each publisher who publishes a book, each person who stands on a soap box on a market square to give a speech" (Deutscher Bundestag, 2017b, p. 25116, author translation). Newspaper editors also have to take responsibility for publishing letters to the editor even if these do not represent their opinion, the minister argues (Bouhs, 2017b, para. 19), drawing a direct analogy between newspaper editors and online platforms. Minister Maas accordingly compares the platform companies' duty to comply with law to everyone's duty to respect law in everyday life: "Each and every one of us has to deal with the simple application of law, from road traffic regulations to tax law. Why should this not apply for social networks?" (Maas, 2017b, para. 60, author translation). The NetzDG only incentivizes the fulfilment of this obligation for the sake of equality, Maas seems to imply.

Property Entails Obligations

One basic right that only the government refers to is Article 14, paragraph 2, Basic Law. It states that "property entails obligations. Its use shall also serve the public good." This basic right and constitutional principle under the *Rechtsstaat* idea is referred to both explicitly in Maas's speeches (e.g., Maas, 2016, para. 23) and implicitly in the government's demands that "social network operators must live up to their responsibilities" (Federal Ministry of Justice and Consumer Protection, 2017, p. 1). The government underlines the economic dominance of mainly U.S.-based platform companies dodging their compliance with existing German law (e.g., Maas, 2017b, para. 57). Maas (2017b) claims that "when Facebook proudly announces they have doubled their profits once again, one can also expect these corporations to employ enough people to fulfil their legal obligations" (para. 55, author translation). The government's view seems to imply that, given the platform companies' profit-oriented character, any attempt to govern them must speak to their economic rationale. This is reflected in Section 3, stipulating fines of up to €50 million for systematic compliance failures. It is also echoed in Section 1, which limits the NetzDG's scope to platforms with more than 2 million users, thus including the most dominant platforms.

This understanding of the platforms' responsibility matches the government's conception of the causal relation between verbal hate content online and physical hate crime off-line. In the government's view, "verbal radicalization is often the first step towards physical violence" (Federal Ministry of Justice and Consumer Protection, 2017, p. 1) and online platforms frequently serve as the starting point for such radicalization processes and off-line hate crimes (Maas, 2017a, para. 2). Identifying online platforms as the main problem in the proliferation of online hate content, the government is thus using the NetzDG to target online platforms rather than the people posting hate content.

In fundamental contrast, platforms assert that the proliferation of online hate content is only a symptom, but not the cause, of a hateful, deteriorating debate culture off-line (e.g., Bouhs, 2017a; YouTube LLC & Google Inc., 2017). Civil-society organizations stress that solutions for tackling the origins of hate in

society as a whole are needed instead of laws like the NetzDG, which only tackle the symptoms (e.g., Gesicht zeigen! Für ein weltoffenes Deutschland, 2017).

Validity of Constitutional Principles

The *Rechtsstaat* idea is also reflected in the prevalence of the facet regarding the validity of constitutional principles.

Legal Certainty

The government's assertion that the NetzDG is necessary to tackle hate content has dominated the policy discourse from the outset (BMJV, 2017a, p. 1). However, the term is at no point legally defined. Instead, under Section 1, the NetzDG and its drafts are only concerned with content that is defined as illegal according to existing law—namely, a list of statutes of the Criminal Code, which was included in the NetzDG's drafts and changed several times in the policy-making process. The second draft, for example, incorporates a list of 24 instead of originally 14 criminal statutes (Federal Ministry of Justice and Consumer Protection, 2017), including the prohibition of child pornography and other criminal offenses that go beyond the common understanding of hate content. Platform companies and civil-society organizations therefore accuse the government of a seemingly arbitrary selection of criminal statutes and irresponsible alterations to the original selection (e.g., eco-Verband der Internetwirtschaft, 2017, p. 2; Reporter ohne Grenzen, 2017, p. 4). They essentially call for the validity of constitutional principles—namely, the principles of legal certainty as well as the need for rational and calculable state actions, which the NetzDG would violate.

Another frequent criticism raised by platform companies and civil-society organizations in this relation is the vagueness of terms and legal concepts in the NetzDG (e.g., Digitale Gesellschaft, 2017a, p. 6; Facebook Germany GmbH, 2017, p. 10; YouTube LLC & Google Inc., 2017, p. 15). For example, Section 3 stipulates time frames for the removal of "manifestly unlawful" as well as other unlawful content, without, however, making a precise distinction between the two. Through this criticism, platform companies and civil-society organizations highlight the need for legal certainty and definitiveness of law under the *Rechtsstaat* idea, which the NetzDG would disregard.

In contrast, the government emphasizes that the NetzDG guarantees legal certainty precisely by defining illegal content according to existing statutes of the Criminal Code (e.g., Federal Government of Germany, 2017a, p. 2). In this vein, in a response to the Council of Europe, but also in a striking contradiction to its dominant claims on fighting hate content online in general, the Federal Government stresses that the NetzDG "is about criminal content, about hate crime—and not about hate speech" (Federal Government of Germany, 2017b, p. 1).

Proportionality of State Action

From the government's perspective, the NetzDG's introduction complies with the principle of proportionality, as the government did not immediately enact the new law, but first initiated a taskforce to resolve the proliferation of hate content by self-regulation (Bouhs, 2017b, para. 20). The government's

efforts in leading the year-long work of this voluntary taskforce together with the platforms can therefore be seen as an effort to exhaust less interfering means before resorting to the stronger instrument of legislative action, thus following the principle of proportionality.

As platform companies argue, however, the government could have introduced less interfering and equally effective measures regarding the NetzDG's specific content as well as its character as a legislative act (e.g., Digitale Gesellschaft, 2017a, p. 2). For instance, the NetzDG could have implemented a more comprehensively developed model of regulated self-regulation beyond the voluntary option for platform companies to create a self-regulatory agency under Section 3, paragraph 6, NetzDG. Overall, the strictness of the NetzDG's provisions would not conform to the principle of proportionality (Ladeur & Gostomzyk, 2017, p. 8).

State Organization

Platform companies and civil-society organizations argue that the NetzDG unlawfully shifts the responsibility for deciding upon the legality of content to private actors (e.g., Digitale Gesellschaft, 2017a, p. 3; Facebook Germany GmbH, 2017, p. 2). They thereby specifically emphasize the primacy of an independent judiciary as part of the separation of powers within Germany's state organization: "We refuse to be the authority that takes the decisions for which the courts are actually responsible" (Bouhs, 2017a, para. 3, author translation), Facebook's representative claims. Not private actors, but the state's independent judiciary is in charge for striking the balance between freedom of expression and personal rights, they argue. More specifically, any content deletion must be based on proportionate decisions by an independent judiciary, which does not have to decide under time pressure (BVDW, 2017, p. 2; eco-Verband der Internetwirtschaft, 2017, p. 7). This directly conflicts with the tight time frames of 24 hours or seven days in which platforms have to take decisions according to Section 3, NetzDG. Particularly platform companies highlight the fact that the NetzDG lacks a due procedure for determining the legality of content, which should involve evidence gathering and hearing of defendants by the court (e.g., YouTube LLC & Google Inc., 2017, p. 22). They also thereby accentuate the provision of a due legal procedure as stipulated in the supremacy of basic rights.

The government, on the other hand, stresses that according to Section 4, paragraph 5, NetzDG, a preliminary court ruling is required before the Federal Office of Justice can actually issue a regulatory fine (Federal Government of Germany, 2017a, pp. 2–3). Therefore, the government argues, the NetzDG respects the importance of an independent judiciary for guaranteeing the validity of law.

Proper Legislative Procedure

Opponents sharply criticize the NetzDG's policy-making process as being too fast, precipitous, and not appropriately valuing basic rights (e.g., Deutscher Bundestag, 2017b, p. 1522; Digitale Gesellschaft, 2017b). They thereby express the need for a proper legislative procedure. In the NetzDG's policy-making process, the ministry had submitted an edited draft to the European Commission for notification even before having received stakeholder submissions on the NetzDG's first draft, which the ministry itself had called for. The government had also acted strategically to pass the law before the end of the legislative period. To save time by circumventing the need for a statement of the Federal Council, the government had introduced the

draft in parliament through the government coalition parties, although the Ministry of Justice had drafted it. By pushing the law through this accelerated but legally due process, the government is convinced that it adhered to the procedural provisions of the Basic Law, despite a shortage of time (Federal Government of Germany, 2017a, p. 1).

In contrast, opponents claim that the government's dealing with the rules for the legislative procedure reveals a disregard for the proportionality principle, under which, particularly when basic rights are affected, the state has to apply particular care to make proportionate decisions (e.g., Bouhs, 2017a; BVDW, 2017, p. 1). The incompatibility of the NetzDG with the Basic Law, in this view, results from a policy-making process that undermines facets of the *Rechtsstaat* idea.

Conclusion

This study examined the role of the *Rechtsstaat* idea in the policy discourse on the NetzDG. Applying a discursive institutionalist framework, it described the NetzDG as an institution and *Rechtsstaat* as an idea. The TA of documents from the policy-making process illustrated how—explicitly and implicitly—different policy actors express and apply the *Rechtsstaat* idea and its five facets to legitimize their views on the NetzDG. An illustrative example is the use of the facet of the existence, validity, and primacy of law. The government applies it to underline the necessity of the NetzDG as a state action to guarantee the validity and primacy of law on the Internet. In contrast, opponents argue that by requiring online platforms to remove illegal content, the NetzDG privatizes the enforcement of law, and thus disrespects this facet.

Altogether, the idea of the *Rechtsstaat* plays a guiding and pervasive role throughout the policy discourse on the NetzDG and heavily permeates its content. As an idea in the discursive institutionalist sense, the *Rechtsstaat* appears to have guided the policy actors' interpretations of the problem at hand. It seems to have helped to "produce policy change" (Schmidt, 2010, p. 48)—an institutional shift from the previous model of regulated self-regulation to statutory regulation—namely, the NetzDG. As a new institution in the discursive institutionalist sense, it emerged from actors' intersubjective exchanges on different conceptions of an idea. This analysis of the role of the *Rechtsstaat* idea in the policy discourse on the NetzDG illustrates how different actors attempt to gain power from the *Rechtsstaat* idea as a "force" (Schmidt, 2010, p. 48), whether consciously or unconsciously. At the same time, the actors reinforce the *Rechtsstaat* idea. Despite the *Rechtsstaat* idea's broad and multifaceted character, examining its application in the policy discourse contributes to a better understanding of the emergence, development, and content of the NetzDG. The findings underline the importance of considering the role of ideas in policy discourses. Ideas can be early indicators of the emergence and development of new institutions in the field of online platform governance.

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